UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 22

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CARE ONE AT MADISON AVENUE, LLC	
D/B/A CARE ONE AT MADISON AVENUE,	
Employer,	
v.	Case 22-RC-072946
1199 SEIU, UNITED HEALTHCARE	
WORKERS EAST,	
Petitioner.	

<u>PETITIONER'S BRIEF IN OPPOSITION TO THE EMPLOYER'S</u> EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS

1199 SEIU United Healthcare Workers East ("Petitioner" or "Union"), by its attorneys, Gladstein, Reif & Meginniss, LLP, submits this brief in opposition to the Employer's Exceptions to the Hearing Officer's Report on Objections ("Exceptions").

PRELIMINARY STATEMENT

On January 23, 2012,² the Union filed a representation petition to represent employees of Care One at Madison Avenue ("Employer" or "Madison Avenue"). Pursuant to a Stipulated Election Agreement, an election was held on March 23. The Union lost the election by one vote,

The Employer filed both Exceptions to the Hearing Officer's Report on Objections and a Memorandum of Law in Support of Exceptions. References to specific Exceptions are identified as "Exceptions No. ____."

References to the Employer's Memorandum of Law are identified as "Memorandum at ____." References to the transcript are identified as "Tr." and references to Petitioner exhibits are referred to as "Pet. Ex. ___."

All dates refer to 2012 unless otherwise indicated.

with 58 votes cast against the Union and 57 votes cast for the Union, and one challenged ballot.³ On March 30, the Union filed 20 Objections to the election, all but three of which were scheduled for hearing. The Hearing was conducted on May 18, 21, 23, 24 and 29.

On June 18, the Hearing Officer issued his Report on Objections ("Hearing Officer's Report"). In it, the Hearing Officer recommended that the Board sustain Petitioner's Objections 9, 16 and 19 and set aside the election results. On July 13, the Employer filed its Exceptions challenging the Hearing Officer's recommendations with respect to Objections 9, 16, and 19.

The Hearing Officer's findings and recommendations are supported by substantial record evidence and well-established Board precedent. To prevail in its objections to an election, the objecting party must show that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election. *Delta Brands, Inc.*, 344 NLRB 252 (2005). The Board considers a number of factors when evaluating whether conduct is objectionable including the number of employees subjected to the misconduct, the proximity of the misconduct to the election date, the extent of dissemination of the misconduct among the bargaining unit, and the closeness of the final vote. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004). Furthermore, the Board will not overrule a Hearing Officer's credibility resolutions unless a clear preponderance of all relevant evidence convinces the Board that the findings are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957).

Here, the Employer's objectionable conduct included the denial of a health insurance benefit to eligible voters that it granted to all other employees during the critical period. The Employer also threatened a Union representative with violence in the presence of an eligible

The Employer repeatedly states in its Exceptions that objectionable conduct influencing one vote would be insufficient to change the election results. This is incorrect. As properly noted by the Hearing Officer, a one-vote swing in favor of the Union would have made the challenged ballot determinative, potentially changing the outcome of the election. Hearing Officer's Report on Objections at 7-8.

voter and told an eligible voter that employees would never get a contract if the employees voted in favor of union representation. The nature of the Employer's misconduct, together with the closeness of the final vote, fully support the Hearing Officer's recommendation that the election be set aside.

ARGUMENT

OBJECTION 16: The Board Should Sustain Objection 16 Because the Hearing Officer Properly Concluded That the Employer's Withholding of Health Insurance Benefits From Unit Employees During the Critical Period Was Objectionable.

The facts supporting this Objection are undisputed and clearly detailed in the Hearing Officer's Report. Hearing Officer's Report at 12-13. In January, Care One,⁴ implemented company-wide changes in its health insurance benefits that increased employee premium contributions. This change was so unpopular with employees that Care One decided to dramatically reduce employee contributions to health insurance.⁵ This change was implemented at all Care One facilities system-wide,⁶ for all employees, except those involved in a representation campaign. *Id.* The reduction in employee premiums was announced at Madison Avenue on March 5, less than three weeks before the Union election. *Id.*

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⁴ Care One operates numerous nursing homes, including Care One at Madison Avenue, throughout New Jersey, Connecticut, and Massachusetts. Tr. 101.

Employee contributions for some employees were reduced by as much as 34%. Pet. Ex. 6.

The Employer excepts to the Hearing Officer's findings that the benefits were conferred system-wide rather than just at the facilities supervised by Brian Karstetter, Care One's Regional Director of Operations. Exceptions No. 12. The Employer claims that no one with personal knowledge confirmed whether the changes to health insurance were implemented system-wide. Memorandum at 7. This is entirely inaccurate. Counsel for the Employer elicited testimony from Administrator George Arezzo confirming that the reductions in employee health insurance premiums took place at all Care One facilities. Specifically, Arezzo testified that "the rollback was done system-wide, throughout all CareOne facilities, New Jersey, Connecticut, Massachusetts, across the board." Tr. 101. Sara Flaumenhaft, the Employer's Director of Recreation, testified that the memo announcing the changes in health insurance was distributed "company-wide" "to all facilities." Tr. 341. There is nothing in the record to suggest that Arezzo's and Flaumenhaft's testimony was not based on personal knowledge. Furthermore, Karstetter testified that the health insurance was changed at all ten of the Care One centers under his control. Tr. 270, 275. The fact that the change was implemented at ten facilities in New Jersey, and was implemented for all Madison Avenue employees but eligible voters, is sufficient to make the conduct objectionable.

The Employer communicated the reduced premiums to employees in a number of ways. It posted a memo at the facility explaining the changes and indicating that the cost savings to employees would be effective on the March 23 paydate, and retroactive to January. *Id.* at 12. This memo made clear that the reduced premiums applied to all employees but those in the voting unit. *Id.* This same memo was distributed to approximately 125-130 Madison Avenue employees. Tr. 87. Finally, the reduction in premiums was discussed on all shifts with all employees. Hearing Officer's Report at 12; Tr. 294. Unit employees were not told why they were being excluded from the benefit and were not told whether they would get the benefit after the election. In fact, when unit employees asked the Employer's highest ranking official at the nursing home, Administrator George Arezzo, about the change in benefits, he said that he could not discuss health insurance with them "at this time during the campaign." Tr. 46; Hearing Officer's Report at 12. Applying Board law to these undisputed facts, the Hearing Officer correctly determined that the withholding of benefits from unit employees was objectionable.

The Employer argues that the Hearing Officer's recommendation should be overruled because the Hearing Officer misinterpreted Board law, because the Objection did not put the

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The Employer excepts to the Hearing Officer's finding that this statement was made by Arezzo. Exceptions No. 8. Rather, this statement was made by Brian Karstetter. Tr. 294. The Employer argues that Karstetter's testimony should be read to mean that the health insurance changes were discussed with all employees but unit employees. However, Karstetter's testimony fails to provide any such qualification. In any event, it is undisputed that unit employees were aware of the change in health insurance, as they questioned Administrator Arezzo about it. Hearing Officer's Report at 12; Tr. 46. There is also no dispute that the cost of health insurance was an issue of concern among unit employees during the campaign. Arezzo testified that, during the critical period, employees told him that health insurance costs were too high. Tr. 45-46.

The Employer claims that its failure to provide an explanation was consistent with its position throughout the campaign to refrain from altering the status quo or discussing possible changed terms and conditions of employment with voters. Memorandum at 14. Any such claim is irrelevant given that the changes in health insurance did alter the status quo (unit employees suddenly found themselves excluded from a benefit to which all other employees enjoyed, when previously health insurance benefits had been extended to all employees equally). Additionally, the changes in health insurance were not a hypothetical or future benefit. Rather, the reduced costs were made effective during the critical period. Whether or not the Employer told employees that it could not promise or discuss future benefits is irrelevant to whether it was obligated to explain a significant change in the status quo (see *supra*, fn. 15).

Employer on notice of the nature of the Union's claim, and because the Union failed to show that the objectionable conduct affected the outcome of the election. The Employer also argues, assuming the Board considers the Employer's conduct objectionable under existing law, that Board precedent should be changed to allow employers to, without explanation, withhold a grant of company-wide benefits from eligible voters during the critical period. For the following reasons, the Board should reject the Employer's arguments and adopt the Hearing Officer's recommendation to sustain Objection 16.

A. Board Law Clearly Prohibits Employers From Withholding a Grant of Company-Wide Benefits from Unit Employees During the Critical Period.

An employer's legal duty in deciding whether to grant or withhold benefits while a representation petition is pending is to proceed exactly as it would have if the union was not on the scene. *See e.g. Lampi, L.L.C.*, 322 NLRB 502, 502 (1996); *Russell Stover Candies, Inc.*, 221 NLRB 441, 441 (1975). This means that an employer may not withold benefits that would have been provided but for the pendency of an election. *See e.g. The Gates Rubber Company*, 182 NLRB 95, 95 (1970). Such a rule is necessary to prevent an employer from manipulating the granting or withholding of benefits in order to gain an advantage in a union election. *Pennsylvania Gas and Water Company*, 314 NLRB 791, 793 (1994).

The withholding of company-wide benefits from employees involved in a representation campaign is unlawful and objectionable, even when the benefits provided were unanticipated.

See e.g. Noah's Bay Area Bagels, LLC, 331 NLRB 188 (2000); Associated Milk Producers, 225 NLRB 750 (1981). Thus, if an employer grants company-wide benefits during the critical period, it cannot exclude employees in the voting unit from receiving that benefit.

The only circumstances under which an employer may withhold company-wide benefits from unit employees is if the employer provides unit employees with adequate assurances that

the benefits will be applied after the election, regardless of the outcome, and informs those employees that the sole purpose of the postponement is to avoid the appearance of influencing the election. *See e.g. Noah's Bay Area Bagels*, 331 NLRB at 191; *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995); *Atlantic Forest Products, Inc.*, 282 NLRB 855,858 (1987). By granting such assurances, unit employees are not left to draw their own conclusions about why the benefits are being withheld or whether they will be provided at all.

In *Noah's Bay Area Bagels*, a case directly on-point, the Board found unlawful an employer's decision, during the critical period, to deny company-wide improvements in health insurance benefits to employees involved in a pre-election campaign. *Noah's Bay Area Bagels*, 331 NLRB at 189. While finding that the employer had legitimate business reasons for both the restoration of benefits and the timing of the announcement of the improvements, the Board held that the employer had no lawful basis for withholding the benefits from employees involved in the representation proceedings. *Id.* at 191. In fact, the Board held that it was precisely because the employer had a legitimate justification for its system-wide change, meaning reasons entirely unrelated to union activity, that the withholding of benefits from unit employees was unlawful. *Id.* Because the employer failed to provide adequate assurances to unit employees that the benefits would be provided after the election regardless of outcome, the Board held that

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As in the present case, in *Noah's Bay Area Bagels* the employer had made unpopular reductions in employee health insurance benefits prior to the union campaign. *Id.* at 190. Due to employee dissatisfaction, the employer decided to restore benefits that had been reduced and announced the restoration to employees at all of the company's stores, except the one involved in an organizing campaign. *Id.*

Specifically, the Board found that, given the importance of health insurance benefits to employees and based on the employee complaints about the reduction in benefits, the employer had a persuasive business reason to announce the restoration of benefits as quickly as possible. *Id.* at 190.

the withholding of benefits was unlawful. *Id.* at 190-91.¹¹

Similarly, in *Associated Milk Producers*, the Board set aside an election based, in part, on the employer's failure to grant an unanticipated company-wide wage increase to unit employees during the critical period. *Associated Milk Producers*, 225 NLRB at 750, 752. The employer argued that the withholding of benefits was permissible because the increase was not part of a normal anticipated benefit. *Id.* at 755. The employer also defended its decision not to grant the benefit to unit employees on grounds that the employer believed doing so during the critical period would be unlawful. *Id.* The Board rejected these defenses and held that the determinative fact was that the unit employees would have been granted the increase *but for* the presence of the union. *Id.* at 750; *see also Russell Stover Candies, Inc.*, 221 NLRB at 441 (no defense that employer withheld the increase to avoid the appearance of undue influence).

The law is well-established. If an employer grants a company-wide benefit during the critical period it has only two options. It can grant the benefit to all employees, including unit employees, or it can postpone the grant of benefits to unit employees *provided* it tells unit employees that they will receive the benefit after the election, regardless of outcome. Here, there is no dispute that the unit employees would have received the company-wide improvements in health insurance but for the union campaign. Furthermore, there is no dispute that the Employer failed to tell unit employees that they would get the benefit after the election regardless of outcome. Accordingly, the Hearing Officer correctly applied the law in finding the withholding of benefits to be objectionable.

The Employer contends that the Hearing Officer misinterpreted and misapplied the law. Exceptions Nos. 9, 11, 13, 15, 16. Specifically, the Employer argues that withholding company-

The employer told unit employees that it was not extending the improved benefits to them because doing so could be seen as an attempt to influence the election but that they would be given more information "as soon as our situation with the NLRB becomes clear." *Id.* at 190.

wide benefits from unit employees during the critical period is completely permissible and that employers may, but are not required to, communicate the reasons the benefits are being withheld or tell employees that the benefits will be provided after the election. A simple reading of the relevant cases shows that the Employer's interpretation of Board law is entirely without merit. If an employer chooses to postpone a benefit, it must communicate the appropriate assurances to employees. See e.g. Noah's Bay Area Bagels, LLC, 331 NLRB 188 (2000); Network Ambulance Services, Inc., 329 NLRB 1 (1999); Kauai Coconut Beach Resort, 317 NLRB 996 (1995); Associated Milk Producers, 225 NLRB 750 (1981).

The Employer relies on *Noah's Bay Area Bagels* to support its claim that employers are not required to communicate with unit employees when withholding a benefit during the critical period. Memorandum at 12.¹² However, in that case, the employer's withholding of benefits was found objectionable *precisely because* the employer failed to adequately communicate with employees that the withholding of benefits was temporary and would be provided after the election regardless of outcome. *Noah's Bay Area Bagels*, 331 NLRB at 191. Similarly, the Employer misreads or mischaracterizes *Network Ambulance Services*. Memorandum at 13. That case clearly stands for the proposition that an employer may defer benefits for unit employees until after the election *only if* the employer makes clear to employees that the improvement will occur regardless of whether they select the union. *Network Ambulance Services, Inc.*, 329 NLRB at 2, fn. 6 (*citing Atlantic Forest Products.*) The Employer's reliance on *Kauai Coconut Beach Resort* is similarly misplaced. There, employees were informed of the benefit prior to the critical

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In part, the Employer rests its claim on the Board's use of "may" when discussing the assurances employers must provide if withholding system-wide benefits from unit employees. A simple reading of the cases relied on by the Employer makes clear that the Board uses "may" in this context to mean permissible, not optional. For example, in *Noah's Bay Area Bagels* the Board explains that "while an employer is not permitted to tell employees that it is *withholding* benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be *deferred* until after the election – regardless of outcome." *Noah's Bay Area Bagels*, 331 NLRB at 189.

period and the employer delayed the benefit for all employees until after the election. *Kauai Coconut Beach Resort*, 317 NLRB at 996. Moreover, in *Kauai*, the employer's postponement of benefits was permissible *only because* the employer told employees they would receive the benefit after the election and that the benefit was being delayed solely to avoid the appearance of undue influence. *Id.* at 996-97.

The Employer also challenges the Hearing Officer's reliance on *Atlantic Forest Products* and *Russell Stover Candies* in support of his findings that the withholding of benefits was objectionable. Memorandum at 15. The Employer claims these decisions are inapposite because they involve the withholding of a recurring benefit while, here, unit employees had no expectation of any reduction in health insurance benefits. *Id.* at 15-16. According to the Employer, when benefits are unanticipated, there is no need to explain why the benefits are withheld.

However, the holdings of *Russell Stover Candies* and *Atlantic Forest Products* do not rely on the fact that the benefits at issue were anticipated. Rather, the employer's conduct was found to be unlawful because the benefits would have been provided to unit employees *but for* the presence of the union. *Russell Stover Candies*, 221 NLRB 441 (1975) (employer's conduct violated the Act because it altered its normal course of action); *Atlantic Forest Products*, 282 NLRB at 858. An employer's obligation when granting benefits is to proceed as if the union were not on the scene. *See e.g. Lampi, L.L.C.*, 322 NLRB 502, 502 (1996); *Russell Stover Candies, Inc.*, 221 NLRB 441, 441 (1975). Numerous cases, including *Noah's Bay Area Bagels*, also cited by the Hearing Officer, make clear that this rule applies whether or not the benefit was

recurring. See e.g. Noah's Bay Area Bagels, 331 NLRB at 191; Associated Milk Producers, 225 NLRB at 755. 13

Contrary to the Employer's claim, the rationale in these cases is not limited to recurring benefits. Furthermore, such a limiting principle would not make sense. Whether or not a benefit is anticipated, unit employees reasonably expect to receive it as soon as it is granted to all other employees.

Board law is clear that employers cannot grant company-wide benefits to all employees but withhold those benefits from unit employees during the critical period and remain silent about it. The Hearing Officer properly relied on Board law in finding the Employer's conduct to be objectionable.

B. The Board Should Not Change Existing Law to Allow Employers to Withhold Company-Wide Benefits From Unit Employees During the Critical Period.

The Employer also argues that the Board should reverse long-standing precedent and allow employers to withhold from unit employees benefits it grants to all other employees during the critical period. In support of this position, the Employer argues that the current rule is confusing and does not provide enough protection for employers who are concerned that granting a benefit during the critical period would expose it to liability.

The Board has rejected such claims that its rules regarding the granting and withholding of benefits are confusing for employers. *Noah's Bay Area Bagels*, 331 NLRB at 189 (concluding that the law in this area is clear). Compliance with Board law is particularly easy with respect to the grant a company-wide benefit during the critical period. In a long-line of cases, the Board has held that an employer can grant system-wide benefits to unit employees

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In fact, the Hearing Officer relies on *Russell Stover Candies* in support of his finding that the Employer failed to provide adequate assurances to unit employees that they would receive the benefit after the election regardless of outcome. Hearing Officer's Report at 13. That is appropriate where, as here, the Employer blamed the Union for the fact that the company-wide benefits were being withheld from unit employees. *Id.*

during the critical period without any concern that doing so will expose it to liability. See e.g. Network Ambulance Services, 329 NLRB at 1, fn. 4; Associated Milk Producers, 225 NLRB at 755. According to the Board, the system-wide nature of the action is evidence that the grant of benefits was taken for legitimate business reasons. See e.g. Network Ambulance Services, 329 NLRB at 1, fn. 4 (a multiunit entity is unlikely to have granted a benefit to all of its employees solely for the purpose of influencing an election that affected only a few); Associated Milk Producers, 225 NLRB at 755 ("no contention" that employer would have been as risk had it granted company-wide benefits to unit employees during the critical period because the benefit was due to reasons entirely unrelated to the union). Had the Employer done its research, it could have had no legitimate concern that granting the benefits to unit employees during the critical period would have exposed it to liability.

Not only is the current rule clear, it is also necessary to effectuate the Act's policies. The rules regarding the granting and withholding of benefits during the critical period are designed to neutralize the power employers have to influence elections by manipulating benefits. They flow from the basic principle that, during the critical period, employers must act as if no union is on the scene. *See e.g. Lampi, L.L.C.*, 322 NLRB 502, 502 (1996); *Russell Stover Candies, Inc.*, 221 NLRB 441, 441 (1975). The Employer's proposed rule that would permit employers to grant significant system-wide benefits days before the election and, without explanation, withhold those benefits only from eligible voters flies in the face of this basic Board principle. Doing so would manipulate voters' free choice by sending the message, in fact an accurate one, that

The Employer's contention that its proposed rule is consistent with the general principle that employers are required to maintain the status quo during the critical period is fundamentally flawed. That principle has no application where an employer maintains the status quo of inferior benefits for only the eligible voters, while at the same time improving those benefits for its other employees. Accordingly, the Employer's rule finds no support in *NLRB v. Exchange Parts*, 375 U.S. 405 (1964).

employers could exclude employees from benefits based solely on the fact that they choose to participate in a representation election. Employees would also reasonably be led to believe that whether or not they would enjoy such benefits in the future was entirely connected to the outcome of the election. Such a message would have a chilling effect, both on unit employees and employees outside the voting unit, in the exercise of their Section 7 rights.¹⁵

The facts of the present case clearly illustrate the danger of revising the current rule.

Less than three weeks before the election, the Employer provided a significant economic benefit to non-unit employees related to an issue that was a specific concern among unit employees during the campaign. There is no dispute that unit employees were aware of their exclusion from this important benefit or that employees were not told when, or if, they would receive the benefit. Furthermore, the Employer told unit employees that it could not discuss the change with unit employees *because of* the union campaign. Conduct is objectionable if it has the "tendency to interfere with employee's freedom of choice." *Delta Brands, Inc.*, 344 NLRB 252 (2005). It is hard to imagine actions more likely to influence an election result than withholding

The Employer argues that its proposed rule should apply, at a minimum, to situations where the employer had a policy of telling voters that it could not discuss changes in terms and conditions of employment during the critical period. Memorandum at 20. As discussed above, such a limiting principle would not eliminate the coercive nature of granting benefits to all employees company-wide and excluding only those involved in a representation campaign. Furthermore, any claim that the Employer maintained such a policy here is not supported by the record. There is no evidence that the Employer ever refused to discuss a particular issue with employees, except for the health insurance changes. Rather, the record is clear that throughout the critical period, the Employer had numerous meetings with employees to discuss conditions of employment including ones where Arezzo asked employees what he could do to make their jobs easier. Tr. 45, 342, 408. While not evidence that the Employer made promises of future benefits, it is clear that the Employer did not refrain from discussing terms and conditions of employment with voters. Furthermore, anti-union fliers distributed by the Employer during the Union campaign make specific reference to the impact the election of the Union would have on terms and conditions of employment. For example, fliers threaten that with a union employees may not get their full pension and may end up earning less. Pet. Ex. 2. Moreover, the Employer's view that it refrained from discussing terms and conditions of employment with employees demonstrates that its rule would create, not resolve, uncertainly in this area.

During the campaign, unit employees expressed concerns to the Employer about the high costs of health insurance. Tr. 45-46.

As correctly found by the Hearing Officer, through such comments the Employer effectively put the blame on the Union for the fact that benefits were withheld from unit employees. Hearing Officer's Report at 13.

a benefit granted to all other employees in the days leading up to the election to which unit employees would have been otherwise entitled. Here, the Union lost the election by one vote.

Failing to set aside the election in these circumstances would reward an employer that manipulated benefits in a way that clearly had a tendency to influence employee free choice.

For this reason, the Board should reject the Employer's proposal to modify existing Board law.

C. The Employer's Conduct Had a Reasonable Tendency to Affect the Outcome of the Election.

The Employer also argues that the Hearing Officer's recommendations are not supported by the record because the Union failed to show improper motive or that the Employer's actions had the affect of discouraging employees from voting for the Union. Memorandum at 18-19. Here again, the Employer misunderstands the relevant legal standard.

To meet its burden, an objecting party must show that the conduct in question affected employees in the voting unit and had a reasonable tendency to affect the outcome of the election. *See e.g. Delta Brands, Inc.*, 344 NLRB 252 (2005); *Hopkins Nursing Care Center*, 309 NLRB 958 (1992). The test is an objective one based on a number of factors including the number of employees subjected to the misconduct, the proximity to the election date, the extent of dissemination among bargaining unit employees, and the closeness of the final vote. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004).

Here, all of these factors favor setting aside the election based on the employer's withholding of benefits from unit employees. All unit employees were excluded from the grant of benefits, the announcement of their exclusion, and the grant of the benefits to non-unit employees, occurred less than three weeks before the election, the announcement was posted and widely distributed throughout the facility, and the Union lost the election by one vote. The

record is also clear that unit employees were aware of the change, as they asked Administrator Arezzo about it. Hearing Officer's Report at 12; Tr. 46.

For these reasons, the Hearing Officer properly concluded that the Employer's conduct had a reasonable tendency to affect the election results.

D. The Employer Had Meaningful Notice of the Nature of Objection 16.

Finally, the Employer claims that the Board should overrule the Hearing Officer's recommendation with respect to Objection 16 because the Employer did not have notice of the claim against it. Specifically, the Employer alleges that its due process rights were violated because the Union's Objection included the Employer's improper purpose in withholding benefits and that, therefore, the Objection did not set forth the conduct that the Hearing Officer found objectionable. Once again, the Employer's argument is entirely without merit.

Board rules require only that objecting parties furnish "a short statement of the reasons" for the objection. NLRB Rules and Regulations, 102.69(a). This statement must provide "meaningful notice" of the claim. *Factor Sales, Inc.*, 347 NLRB 747, 747-48 (2006). In *Factor Sales*, cited by the Employer, the wording of the objection, and the course of the litigation, "affirmatively misled" the employer as to the dispositive issues at stake and, as a result, deprived the employer of the opportunity to introduce evidence that could have rendered its conduct unobjectionable. *Id*. ¹⁸ Because the hearing officer's basis for sustaining the objection was "materially different" from the allegation of the objection, the Board held that the employer had been denied due process. *Id.* at 747.

the employer's conduct was objectionable with respect to on-duty employees. *Id.*

¹⁸ Specifically, the objection alleged that the employer impermissibly prevented *off-duty* employees from talking to union representatives. *Id.* at 747-48. The Board determined that both the wording of the objection, and the conduct of the hearing officer, reasonably led the employer to believe that the dispositive issue was whether the employees in question were on, or off, duty. For this reason, the Employer defended its conduct only by introducing evidence showing that the affected employees were on work time. *Id.* However, the Hearing Officer ultimately found that

The facts and rationale of *Factor Sales* are inapplicable here. Here, Objection 16 clearly put the Employer on notice that the alleged objectionable conduct was the Employer's reduction of health insurance premiums for non-unit employees only. This is the issue that was fully litigated at the hearing, including through numerous Employer witnesses. Most importantly, the record contains all of the relevant facts and the conduct that was litigated at the Hearing is the conduct that the Hearing Officer ultimately found to be objectionable. The fact that the Employer expected the Union to focus on the Employer's improper motive is irrelevant to whether or not the Employer had meaningful notice of the nature of the Objection.

For these reasons, the Employer's due process claim is entirely without merit.

OBJECTION 9: The Board Should Sustain the Hearing Officer's Finding That the Employer's Agent Threatened Union Representative Brian Walsh With Violence in the Presence of a Unit Employee.

Objection 9 alleges that an agent of the Employer threatened Union Organizer Brian Walsh with violence in the presence of unit employee Yvania Aristal.

As properly noted by the Hearing Officer, it is unlawful and objectionable for an employer to threaten employees with violence because doing so inhibits employees in the exercise of their Section 7 rights. *See e.g. McLane Western, Inc.*, 251 NLRB 1396 (1980); *Control Services*, 315 NLRB 431, 453. Specifically, employees who witness threats of violence are "likely to infer that the employer would retaliate against them as well in some fashion for their union support." *See Control Services*, 264 NLRB 908 (1982), *enfd in relevant part* 723 F.2d (7th Cir. 1983). The same standard applies whether the threats are made to employees or union representatives, provided there are employee witnesses. *See Control Services*, 315 NLRB at 453.

In support of this Objection, the Union called Union Organizer Brian Walsh and Union Vice President Rickey Elliot to testify. Walsh and Elliot testified that Frank, a consultant with the National Labor Consultants and an agent of the Employer, ¹⁹ told Walsh, in the presence of Aristal, that he was going to "kick [his] ass." Hearing Officer's Report at 6-7. The Employer called only one witness, Sara Flaumenhaft, the Employer's Director of Recreation, to rebut the testimony of the Union's two witnesses. The Hearing Officer properly found that the testimony of Walsh and Elliot provided a more detailed recollection of the conversation between Walsh and Elliot and, for that reason, credited their testimony over that of Flaumenhaft. *Id.* at 7.²⁰

The Employer attacks the Hearing Officer's conclusions that Walsh's and Elliot's testimony provided a more detailed recollection of the events. Exceptions Nos. 3, 4, 6.

However, both Walsh and Elliot were parties to the conversation with Frank and provided details of the entire conversation. In contrast, Flaumenhaft was not a party to the conversation and never established how close she was to Frank or whether she could hear everything that was said. In fact, her testimony makes clear that she had not yet reached the group by the time the conversation was over. Tr. 338. The Employer also attacks Walsh's and Elliot's credibility. However, the Hearing Officer's credibility determinations are amply supported by the record. The Board will not overrule a Hearing Officer's credibility resolutions unless a clear

The Employer does not dispute that Frank was an agent of the Employer. Employers are liable for comments of their agents. *See e.g., Mar-Jam Supply Co.*, 337 NLRB 337 (2001); *Cooper Hand Tools*, 328 NLRB 145 (1999). However, the Employer excepts to the Hearing Officer's finding that Frank "frequently" engaged in activities for the Employer. Exceptions No. 2. While not relevant to the current Objection, the Hearing Officer's finding is supported by the record. Frank was hired by Care One to work on the union campaign, spoke with unit employees about the union, and was present at the facility, on behalf of the Employer, on various occasions including on election-day. Tr. 34, 46, 57, 60, 348-49.

The record provides additional reasons to question Flaumenhaft's credibility and her recollection of events on election-day. On direct examination, Flaumenhaft testified that she learned the names of Elliot and Walsh at the ballot count. Tr. 337. However, on cross-examination, she instead stated that she learned Walsh's name from Frank prior to the close of the polls and learned Elliot's name only the day before her testimony at the Hearing. Tr. 346-48.

preponderance of all relevant evidence convinces the Board that the findings are incorrect. Stretch-Tex Co., 118 NLRB 1359 (1957).

The Employer also attacks the Hearing Officer for failing to find that Aristal was not present when Frank threatened Walsh. Exceptions No. 5. Having credited both Walsh and Elliot, who testified that Aristal was present during the conversation with Frank, the Hearing Officer clearly rejected the Employer's claim that Aristal was not present. Hearing Officer's Report at 7. Furthermore, the only witness the Employer called to rebut the testimony of the Union's two witnesses was Flaumenhaft, who did not testify that Aristal was not present. In fact, when asked by Employer's counsel who "was near" Frank when she approached, her answer was, "he was near I think it was two gentlemen." Tr. 337. Flaumenhaft's testimony was simply insufficient to rebut Walsh's and Elliot's testimony that Aristal was present during the conversation with Frank.

At noted by the Hearing Officer, the Employer failed to call Frank who was in the best position to testify for the Employer with respect to who was present during the conversation and what was said.²¹ When a party fails to call a witness under that party's control, and that witness may be reasonably assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *See Greg Construction Co.*, 277 NLRB 1411 (1985). The Employer defends its decision not to call

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The Employer excepts to the Hearing Officer's finding that the Employer provided no explanation for its failure to call Frank. Exceptions No. 1. The record is clear that the Employer did not provide such an explanation. In fact, the Employer concedes that it did not make its reasons for failing to call Frank "explicit." Memorandum at 30. Rather, the Employer explains in its Exceptions that it failed to call Frank and Keith in order to protect their identities. This is a rather specious claim as Frank was identified by witnesses in photographs. Tr. 69-70; Pet. Ex. 3. Even more unbelievable are the Employer's suggestion that it was unable to call Frank or Keith as witnesses because it did not have their last names. Memorandum at 30. These individuals worked for the Employer for months, had access to the facility, including patient areas, and were surely paid for their services. Tr. 34-37, 46-47, 348-49. Regardless, the Employer's reasons for its failure to call Frank or Keith should have no bearing on the Hearing Officer's conclusion that the Employer failed to present sufficient evidence to rebut the Union's evidence supporting the Objection.

Frank on grounds that the National Labor Consultants work on a first-name basis only and that calling Frank, or the other consultant, Keith, would reveal their identities. Memorandum at 30. While the Employer is certainly free to prioritize the wishes of its consultants to remain anonymous over the Employer's interest in rebutting claims of objectionable conduct, the consequence here is that the Employer provided no witness who could competently rebut the testimony of the Union's witnesses that Frank threatened Walsh in the presence of a unit employee.²²

The Employer also argues that there is no evidence that Aristal disseminated Frank's statement to other unit employees and that, therefore, the threat was *de minimis* and insufficient to support the Objection. Exceptions No. 7.²³ Here again, the Employer is simply incorrect that conduct affecting one voter could not have changed the election results. The Hearing Officer properly noted that given the one vote margin of victory for the Employer, and the one challenged ballot, a threat made to only one employee would be sufficient to change the outcome of the election.

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The Employer claims that a negative inference should be drawn against the Union for its decision not to call Aristal as a witness. Memorandum at 30-31. Union counsel stated on the record that numerous employee witnesses were unwilling to come forward because they were afraid for their jobs. Tr. 251. The fact that Aristal served as the union observer two months prior to the Hearing does not provide a basis for drawing an adverse inference. *NLRB v. Gissel Parking Co.*, 395 U.S. 575, 608 (1969). Furthermore, given that Walsh's and Elliot's testimony was detailed, credible and based on their direct observations, Aristal's testimony would have been cumulative. Moreover, there was no need to call her as the Employer failed to rebut the testimony of the Union's witnesses. Finally, the Employer was in as good a position to call Aristal as was the Union.

The Employer's reliance on *Bally's Park Place, Inc.*, 353 NLRB 316 (2008) is misplaced. In that case, it was "virtually impossible" for the threat at issue to have affected the election outcome due to the lack of dissemination, the large size of the bargaining unit and the substantial margin of victory. *Id.* at 330. Here, influencing one vote was enough to change the election result.

OBJECTION 19: The Board Should Sustain the Hearing Officer's Finding that the Employer's Agent Told a Unit Employee That the Employer Would Never Agree to a Union Contract.

Objection 19 alleges that an agent of the Employer told a unit employee that the Employer would never agree to a contract if the Union won the election.

As properly noted by the Hearing Officer, statements by an employer or its agents that the union will never get a contract are unlawful and objectionable. *See e.g. Equipment Trucking Co., Inc.*, 336 NLRB 277, 278 (2001); *Outboard Marine Corp.*, 307 NLRB 1333 (1992); *Taylor Chair Company*, 292 NLRB 658 (1989). Such statements are objectionable because they suggest that employees are exercising their Section 7 rights in vain. *Outboard Marine Corp.*, 307 NLRB at 1335.

In support of this Objection, the Union called Walsh and Elliot as witnesses. The Hearing Officer determined that they provided credible testimony that on the morning of the election, Keith, an agent of the Employer,²⁴ told unit employee Aristal that the Union would never get a contract at Madison Avenue. Hearing Officer's Report at 14. The Hearing Officer credited the testimony of Walsh and Elliot as clear and consistent. *Id.* at 15. Again, the Employer presented only one witness, who was not a party to the conversation, to rebut the testimony of the Union's two credible witnesses. Asha George, the Employer's Director of Rehabilitation, testified very briefly and provided few details regarding the conversation at issue.

The Employer excepts to the Hearing Officer's decision not to credit George's testimony. Exceptions Nos. 18, 19. However, George stated that she did not hear everything that was said in the conversation at issue. Specifically, when George was asked: "Did you hear everything that was said?" she answered "Not everything." Tr. 374. Despite the Employer's attempts to

Here again, there is no dispute that Keith was an agent of the Employer. Hearing Officer's Report at 15.

explain away George's answer, the Hearing Officer properly concluded that George's testimony was contradictory as to whether she overhead the entire conversation and did not credit her testimony in this regard. Hearing Officer's Report at 14.²⁵

Again, the Employer failed to call Keith. For the reasons discussed above, a negative inference should be drawn that Keith's testimony would not have been helpful to the Employer. *See Greg Construction Co.*, 277 NLRB 1411 (1985). In sum, as no credible witness was presented by the Employer to rebut the credited testimony of Walsh and Elliot, the Hearing Officer correctly found that the comments that the Union would never get a contract were made in the presence of an eligible voter.

Finally, there is no merit to the Employer's claim that, because there is no evidence that Aristal disseminated Keith's comment to other unit employees, the threat was *de minimis* and insufficient to support the Objection. Exceptions Nos. 21, 22. As discussed above, in connection with the threat of violence, given the one vote margin of victory for the Employer, and the one challenged ballot, that this comment was made to only one employee is sufficient to change the outcome of the election.

CONCLUSION

For the forgoing reasons, the findings and recommendations of the Hearing Officer should be adopted, the results of the election set aside, and a rerun election conducted.

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The record provides additional reasons to question George's credibility and her recollection of events on election-day. George testified that she could not remember who was with her when she walked towards the building just prior to the conversation at issue or whether Keith was with her at that time. Tr. 370. She also could not remember who else was present when she was standing outside of the building prior to the polls opening. Tr. 370. George could not remember if Keith had been with her earlier in the morning when she had a confrontation with the police or if he was already standing outside of the building when she approached. Tr. 370-71.

Dated: New York, New York July 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on July 30, 2012, the forgoing was electronically filed with the National Labor Relations Board and was served via electronic mail on:

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